

FEB - 6 1981

BOARD OF PERSONNEL APPEALS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF  
THE STATE OF MONTANA IN AND FOR THE COUNTY OF  
LEWIS AND CLARK

INDEXED

POWELL COUNTY SCHOOL DISTRICT #1 )  
 )  
Plaintiff )  
 )  
vs. )  
 )  
STATE OF MONTANA, ex. rel. BOARD )  
OF PERSONNEL APPEALS, et. al., )  
 )  
Defendants. )

Cause No. 44573  
OPINION AND ORDER

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This action originally arises from two unfair labor practice charges filed by Plaintiff Powell County School District #1 (School District) and Defendant Deer Lodge Education Association (DLEA) with the Defendant Board of Personnel Appeals (BPA). The Charges were filed in March and April during the heat of collective bargaining between the parties. Each party charged the other with refusal to bargain in good faith in violation of sections 39-31-401(5) and 39-31-402(2), MCA.

During the pre-hearing conference conducted by the BPA the parties stipulated that they had reached agreement on a collective bargaining contract which had been ratified by both parties, although a signed copy was not then available. The Counsel for the DLEA moved that all charges involving failure to bargain in good faith be dismissed as moot.

Subsequently the hearing examiner for the BPA issued an order dismissing counts II and IV of the DLEA's charge as moot. The DLEA filed timely exceptions to the Order. By a BPA order of December 20, 1978, the DLEA's Exceptions were denied and a hearing was ordered on the charges which had not been dismissed.

The DLEA filed a Petition for Judicial Review, Cause No. 43348 in the First Judicial District, naming the School District and the Board of Personnel Appeals as Defendants. The appeal was based on the DLEA's theory that all charges should have been

*Clara Gilbert*

1 dismissed as moot or, in the alternative, a hearing should have  
2 been scheduled on all charges. Following briefing and oral argu-  
3 ment, the Court issued its Opinion and Order on October 4, 1979,  
4 remanding the matter to the Board of Personnel Appeals with in-  
5 structions to treat the two cases consistently. That is, to  
6 either reinstate the dismissed Counts of the DLEA's charges or, in  
7 the alternative, dismiss all charges as moot.

8 Upon remand the BPA exercised its discretion and, in compli-  
9 ance with the Court's directive, dismissed all charges. The order  
10 dismissing all charges as moot is the subject of this Petition for  
11 Judicial Review.

12 The Defendants have made a motion to dismiss on the grounds  
13 that this court lacks jurisdiction over the subject matter because  
14 Plaintiff is barred from bringing this action by virtue of its  
15 participation in cause #43348 in this same court, involving the  
16 same parties and issues, by either the doctrine of res judicata or  
17 of collateral estoppel. This matter was briefed by the parties  
18 and oral argument was had by this Court.

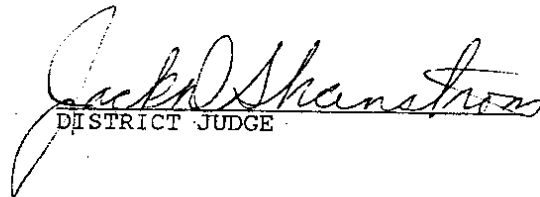
19 Having considered the matter this Court finds merit in the  
20 motion to dismiss. The same issue that was before Judge Bennett  
21 in cause number 43348 is now before this Court. The same parties  
22 are involved in the matter along with the fact situation being the  
23 same. Any order or decision rendered in cause no. 43348 is there-  
24 fore binding on all parties in this matter. SEE: 46 Am. Jur. 2d,  
25 Judgments, section 621, and Smith v. Mussellshell County, 472 P.2d  
26 878 (Mt. 1970).

27 Petitioner argues that such decision deprives it of its right  
28 of review of the Final Order issued by Defendant Board dated  
29 October 29, 1979. With that argument this court cannot agree.  
30 Section 2-4-711 MCA provides that an appeal from a final judgment  
31 of a district court may be taken within 60 days "after entry of  
32 judgment." On review of the record in this matter, this Court can

1 find no indication that an entry of judgment has been made, or  
2 that a notice of entry of judgment has been issued. It appears,  
3 therefore, that the order issued by the Court dated October 4,  
4 1979 in cause no. 43348 was an interlocutory order merely remand-  
5 ing the matter back to the Board and not a relinquishment of final  
6 jurisdiction in the form of a judgment and notice of entry of  
7 judgment. Any objection Petitioner has over the compliance by the  
8 Board with the Court's Opinion and Order dated October 4, 1979,  
9 should be directed to the Court in a Motion in cause #43348 and  
10 not in a new action.

11 ORDER

12 This matter is dismissed on the grounds of collateral estoppel.  
13 DATED this 27<sup>th</sup> day of November, 1980.

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17 DISTRICT JUDGE  
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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE #8-78 & #9-78:

BOARD OF TRUSTEES, SCHOOL )  
DISTRICT NO. 1, POWELL COUNTY, )  
MONTANA, )

Complainant- )  
Defendant, )

- vs - )

FINAL ORDER

DEER LODGE EDUCATION ASSOCIATION, )  
Affiliated with MONTANA EDUCATION )  
ASSOCIATION, )

Defendant- )  
Complainant. )

\* \* \* \* \*

On October 4, 1979, the District Court of the First Judicial District of the State of Montana (Cause No. 43348) issued an order, signed by Judge Gordon R. Bennett, vacating and setting aside an Order dated December 20, 1978, issued by this Board in this matter. The Court further ordered as follows:

". . . This matter is remanded back to Respondent Board of Personnel Appeals with instructions to either reinstate counts II and IV of Petitioner's Complaint (Deer Lodge Education Association's Complaint) or in the alternative dismiss all charges in this matter as being moot."

On October 9, 1979, the Deer Lodge Education Association filed a Motion to Dismiss all charges with this Board. On October 16, 1979, the Board of Trustees filed a Response to Motion to Dismiss opposing the Motion to Dismiss and requesting this Board to hear all of the charges.

After reviewing the briefs involved, we believe that since all charges allege failure to bargain in good faith, and the parties have reached an agreement in this matter, that all of the charges in question should be dismissed as being moot.

1 IT IS THEREFORE ORDERED, that ULP #8-78 and ULP #9-78 are  
2 hereby dismissed as being moot.

3 DATED this 29 day of October, 1979.

4 BOARD OF PERSONNEL APPEALS

5  
6 By Brent Cromley  
7 Brent Cromley  
Chairman

8 \* \* \* \* \*

9 CERTIFICATE OF MAILING

10 I, Jennifer Jacobson, do hereby certify and state that I  
11 mailed a true and correct copy of the above FINAL ORDER to the  
12 following persons on the 29 day of October, 1979:

13 Emilie Loring  
14 HILLEY & LORING  
15 1713 Tenth Avenue South  
Great Falls, MT 59405

16 Richard Volinkaty, Attorney  
17 MORALES, VOLINKATY & HARR  
601 Western Bank Building  
Missoula, MT 59801

18  
19 Jennifer Jacobson  
20  
21  
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28  
29  
30  
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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGES #8 and #9-1978:

BOARD OF TRUSTEES, SCHOOL DISTRICT )  
NO. 1, POWELL COUNTY, MONTANA, )

Complainant/ )  
Defendant, )

- vs - )

ORDER

DEER LODGE EDUCATION ASSOCIATION, )  
AFFILIATED WITH MONTANA EDUCATION )  
ASSOCIATION, )

Defendant/ )  
Complainant/. )

\*\*\*\*\*

A Pre-Hearing Conference Statement was issued on the above captioned matter on July 6, 1978, by the Hearing Examiner, Janice S. VanRiper.

Exceptions to the Order and Request for Oral Argument were filed by Emilie Loring, Attorney for the Association, on July 14, 1978.

Oral arguments were heard by the Board on December 14, 1978. After reviewing the briefs and considering the oral arguments, the Board orders that the exceptions to the Hearing Examiner's Pre-Hearing Conference Statement be denied and that a hearing be scheduled on the charges that have not been dismissed.

DATED this 20<sup>th</sup> day of December, 1978.

BOARD OF PERSONNEL APPEALS

By: Brent Cromley


Chairman

\*\*\*\*\*

CERTIFICATE OF MAILING

I, Jennifer Jacobson, hereby certify and state that I did on the 20<sup>th</sup> day of December, 1978, mail a true and correct copy

1 of the above ORDER to the following:  
2 Emilie Loring  
3 Hilley & Loring, P.C.  
4 1713 Tenth Avenue South  
5 Great Falls, MT 59405  
6  
7 Duane Johnson  
8 Box 4282  
9 Missoula, MT 59801  
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Jennifer Jacobson

BEFORE THE BOARD OF PERSONNEL APPEALS

In the Matter of ULP #8-1978  
and #9-1978: Board of Trustees,  
School District No. 1, Powell  
County, Montana,

Complainant and Defendant

vs.

Deer Lodge Education Association,  
Affiliated with Montana Education  
Association,

Complainant and Defendant.

ORDER

The hearing examiner has considered the possibility that, due to the stipulated occurrences subsequent to the filing of charges, some of the matters involved in the charges may have become moot. This Board does not yet have a well-established policy regarding mootness, and will consequently avail itself of considerations used by the National Labor Relations Board. (See State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974); AFSCME Local 2390 v. City of Billings, Mont. \_\_\_\_\_, 255 P.2d 507, 93 LRRM 2753 (1976)).

Contractual agreement between parties with respect to issues already before the Board does not automatically render those issues moot. NLRB v. American National Insurance Co., 343 U.S. 395 (1952); Sheet Metal Workers Union, 153 NLRB 50, 59 LRRM 1512, 1515 (1965). Similarly, cessation of boycotting does not necessarily render an unlawful boycott issue moot. Carpenters Union Local 74 v. NLRB, 341 U.S. 707 (1951); Linoleum & Carpet Layers, Local 1236, 73 LRRM, 1150, 180 NLRB 241 (1969). The Board does, however, have discretion to refuse to hear a complaint when in its judgment the policy behind the law would be served thereby. Sheet Metal Workers Union, Id at 1515.



1       The primary consideration in such a decision is what  
2 will best serve the public interest:

3       Once a charge is filed the General Counsel  
4 proceeds, not in the vindication of private  
5 rights, but as the representative of an  
6 agency entrusted with the enforcement of  
7 public law and the assertion of the public  
8 interest thereof. [Citations omitted]  
9 When a matter has ripened to the point of  
being before the National Labor Relations  
Board of decision, we must of course give  
paramount weight to the public interest  
affected by withdrawal of the underlying  
charge.

10 Schuylkill Metals Corp., 218 NLRB 49, 89 LRRM 1792 (1975).

11       The public has an interest in peaceful labor relations.  
12 59-1601 R.C.M. (1947) Therefore, if an underlying conflict  
13 remains, the public interest is not served by dismissal of  
14 charges as moot. Carpenters Union Local 74 v. NLRB, 341  
15 U.S. 707 (1951); Linoleum & Carpet Layers Local 1236, 180  
16 NLRB 241, 73 LRRM 1150 (1969).

17       It is apparent that a general underlying conflict still  
18 exists between the parties here, reflected by the fact that  
19 neither party is willing to drop their complaint against the  
20 other. Therefore, in the public interest of resolving  
21 conflict between the Deer Lodge Education Association and  
22 the Board of Trustees, the complaints will not be dismissed  
23 in their entirety.

24       A contract having been reached, however, some particular  
25 issues have become moot. First, although both parties may  
26 still disagree with respect to what demands are subjects of  
27 mandatory bargaining, an agreement has in fact been reached  
28 without such a determination. No public interest would be  
29 served by deciding on these issues, since the demands are  
30 undoubtedly particularized to this negotiation. Secondly,  
31 any decision at this point as to whether the School Board  
32 bargained unfairly by allegedly unilaterally declaring an

1 impasse would serve no useful purpose at this point in time.  
2 Consequently, charges II and IV of Cause ULP #9-78 will be  
3 deemed moot and not be considered by the Board of Personnel  
4 Appeals at this time.

5 It is hereby ordered that paragraphs II and IV from  
6 Cause ULP #9-78 be dismissed for mootness.

7 Dated this 6<sup>th</sup> day of July, 1978.

8  
9 Board of Personnel Appeals

10  
11 By Janice S. VanRiper  
12 Janice S. VanRiper  
13 Hearing Examiner  
14

15 CERTIFICATE OF MAILING

16 I, Janice S. VanRiper, hereby certify and  
17 state that I did on the 6<sup>th</sup> day of July, 1978, mail a true  
18 and correct copy of the above Pre-Hearing Conference State-  
19 ment to the following persons:  
20

21 Emilie Loring, Attorney at Law 1713 Tenth Avenue South Great Falls, Montana 59403	Duane Johnson Box 4282 Missoula, Montana 59806
22 James L. Lee 23 Chairman of the Board of Trustees 24 Powell County School District Number 1 25 Deer Lodge, Montana 59722	David Pugsley 109 Larabie Deer Lodge, Montana 59722
26 Gene Comes, Superintendent Box 630 27 Trask Hall 28 Deer Lodge, Montana 59722	Leo Perkins, President Deer Lodge Education Association 200 Dixon Deer Lodge, Montana 59722

29 Janice S. VanRiper  
30  
31  
32